1961

NLRB Rules for Determining the Appropriate Bargaining Unit in Craft and Departmental Severance Cases

Minn. L. Rev. Editorial Board

Note

NLRB Rules for Determining the Appropriate Bargaining Unit in Craft and Departmental Severance Cases

One of the most complex problems facing the National Labor Relations Board is that of determining when a craft or departmental unit may be severed from an existing industrial unit. The author of this Note analyzes Board decisions to determine what standards are currently being applied in craft severance cases. The author concludes that in general the standards which the Board has developed do not favor either the craft or the industrial union, but rather reflect the Board's attempt to allow the individual worker maximum freedom of choice with a minimum disturbance of industrial stability.

INTRODUCTION

Only a union which has won a Board-directed election in an appropriate bargaining unit may be certified by the National Labor Relations Board as the exclusive bargaining representative of a unit of employees.[1] When an election is requested for a craft or departmental unit comprising a segment of the employees of a pre-existing industrial unit,[2] the appropriateness of the proposed unit is partially dependent upon the propriety of allowing severance from the industrial unit.[3] Thus, the development and ad-

1. Labor Management Relations Act § 9(c), 61 Stat. 144 (1947), 29 U.S.C. § 159(c) (1958) (amended by 73 Stat. 542 (1959), 29 U.S.C. § 159(c) (Supp. I, 1959)).

The Board is authorized to delegate its power to determine the appropriate unit to a three-member panel or to Regional Directors. Labor-Management Reporting and Disclosure Act, 73 Stat. 542 (1959), 29 U.S.C. § 153(b) (Supp. I, 1959).

2. For this purpose, industrial units include plant-wide, employer-wide, and multi-employer-wide bargaining units.

3. The basic election procedure for severance cases was developed in Globe Mach. & Stamping Co., 3 N.L.R.B. 294 (1937), where the Board decided that since bargaining either by the pre-existing plant-wide unit or by separate craft units was feasible the employees in each separate

ministration of rules by which to determine the appropriateness of a proposed unit has required the Board to consider and weigh several broad policy considerations.

Stable industrial relations has been a key *desideratum* of Board policy.[4] Severance is considered disruptive of stable industrial relations because replacing one unit with several creates the possibility of more work stoppages and other disruptions resulting from competition between the unions.[5] Therefore, the policy of promoting stability would seem best served by rules that make severance difficult or impossible. Such rules would also promote stability by providing greater security to industrial unions.[6]

On the other hand, relatively liberal severance rules promote a policy of free choice of bargaining associates and representatives for the workers within severable groups.[7] A policy of free choice, indeed, a sort of *laissez faire* attitude about the structure of labor organization,[8] has played a part in Board rule-making even at the acknowledged sacrifice of stability.[9]

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craft group should decide whether they wished separate craft representation or inclusion in the broader unit. An election was directed whereby the employees in each craft unit were given a choice between the union seeking to represent the plant-wide unit and the union seeking to represent them as a separate unit. The election results determined both the type of unit and the particular representative. This basic election procedure for severance cases has been used since the *Globe* case and remains the rule today. See 19 N.L.R.B. ANN. REP. 43–44 (1954). In Sutherland Paper Co., 114 N.L.R.B. 211 (1955), the Board held that if no union received a majority of votes cast in a severance election, severance would be denied since a *majority* must affirmatively vote for severance. 21 N.L.R.B. ANN. REP. 57 (1956). Also, the Board refused to direct a run-off election in such a case. In American Tobacco Co., 115 N.L.R.B. 218 (1956), the Board held that it would no longer include the "neither" or "no union" choice on conventional severance election ballots. The *American Tobacco* rule has been sustained on judicial review against the contention that it denied employees the right not to be represented by a union. NLRB v. Weyerhaeuser Co., 276 F.2d 865, 872 (7th Cir.), *cert. denied,* 364 U.S. 879 (1960).

4. See, *e.g.,* Jones, *Self-Determination vs. Stability of Labor Relations,* 58 MICH. L. REV. 313 (1960); Rathbun, *The Taft-Hartley Act and Craft Unit Bargaining,* 59 YALE L.J. 1023 (1950).

5. See Jones, *supra* note 4, at 326–28.

6. See Allis-Chalmers Mfg. Co., 4 N.L.R.B. 159, 175–77 (1937) (dissenting opinion of Member Edwin S. Smith); Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 HARV. L. REV. 274, 313–14 (1948); Ornati, *Union Discipline, Minority Rights and Public Policy,* 5 LAB. L.J. 471, 473 (1954).

7. See Jones, *supra* note 4.

8. See American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1422–23 (1954): "If millions of employees today feel that their interests are better served by craft unionism, it is not for us to say that they can only be represented on an industrial basis or for that matter that they must bargain on strict craft lines."

9. *Ibid.* Also see Freidin, *Craft and Splinter Units,* N.Y.U. 7TH CONF. ON LABOR 119, 140 (1954).

Another important policy judgment implicit in the formulation and administration of severance rules is that rules are intended to provide guidance for the persons affected by them.[10] Since representation decisions are not directly appealable,[11] meaningful definitions of the word "appropriate" must, to a large extent, be derived from the Board's opinions. The precedential value of Board decisions depends upon the clarity with which reasons for the formulation and application of the rules are expressed in the opinions[12] and upon the consistency with which the rules are applied in their administration.

The Board's 1954 opinion in *American Potash & Chem. Corp.*[13] is its most recent definitive statement of the rules governing craft and departmental severance. The object of this Note is to attempt: (1) a restatement of the Board-created rules primarily in view of their applications since *American Potash;* (2) an analysis of the extent to which the rules advance the policies upon which they are purportedly based; and (3) an analysis of the consistency with which the rules have been applied. While considerations relating to the scope of the Board's statutory power have played a vital part in the formulation and administration of severance rules, such considerations are beyond the scope of this Note.[14]

10. See Krislov, *Administrative Approaches to Craft Severance,* 5 LAB. L.J. 231, 240 (1954); *cf.* Hughes Aircraft Co., 117 N.L.R.B. 98, 103 (1957) (dissenting opinion of Member Bean). The success of an organizing campaign, for example, may depend on whether the union can ultimately be certified. See COX, CASES ON LABOR LAW 358 (4th ed. 1958).

11. See AF of L v. NLRB, 308 U.S. 401 (1940); Rathbun, *supra* note 4, at 1026.

The Board's determination of an "appropriate" unit is reviewed when the Board petitions for enforcement of an order to bargain with the certified representative of such a unit. Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941). Judicial opinions, however, provide little guide to the proper criteria of "appropriateness," for the courts proceed on the hypotheses that the Board has broad discretion to make unit determinations and that the only question for the courts is whether there has been an abuse of discretion. See, *e.g.,* NLRB v. Clorostat Mfg. Co., 216 F.2d 525 (1st Cir. 1954). An even more limited scope of review is available under the doctrine of Leedom v. Kyne, 358 U.S. 184 (1958). Although that doctrine empowers the federal courts to invoke equity powers to prevent the NLRB from directing an election, the courts have held that *Leedom v. Kyne* is applicable only if the unit is clearly inappropriate. *E.g.,* International Association of Tool Craftsmen v. Leedom, 276 F.2d 514 (D.C. Cir.), *cert. denied,* 364 U.S. 815 (1960); Leedom v. Norwich Connecticut Printing Specialties and Paper Products Union, Local 494, 275 F.2d 628 (D.C. Cir.), *cert. denied,* 362 U.S. 969 (1960).

12. See DAVIS, ADMINISTRATIVE LAW TREATISE § 16.13 (1958). Professor Davis also points out that judicial review of administrative decisions is facilitated if reasons are given by the administrative tribunal. *Id.* at § 16.12.

13. 107 N.L.R.B. 1418 (1954).

14. See American Potash & Chem. Corp., 107 N.L.R.B. 1418 (1954),

I. THE INDICIA OF A SEVERABLE UNIT

A. REQUIREMENT THAT A UNIT BE COMPOSED OF TRUE CRAFTSMEN OR A TRADITIONAL DEPARTMENT

1. The Rationale of the Requirement

The right of severance has been limited to craft and departmental groups rather than being extended indiscriminately to any dissident group within a larger unit.[15] Perhaps this limitation resulted from the nature of the forces which produced the right of severance. After the CIO split from the AF of L, it was the craft unions of the AF of L which agitated for the right of severance because of their interest in securing bargaining rights for craft and departmental workers within the mass production plants represented on a plant-wide basis by the CIO unions.[16] After the NLRB virtually immunized the CIO's plant units from severance in the *American Can Co.*[17] case, the whole drive for changing the Board's policy came from the AF of L's craft unions.[18] Thus, it is not surprising that since the right to sever was conceded,[19] it

54 COLUM. L. REV. 1159 (1954); National Tube Co., 76 N.L.R.B. 1199 (1948), 61 HARV. L. REV. 1457 (1948); Rathbun, *supra* note 4; 58 MICH. L. REV. 476 (1960).

15. See Freidin, *supra* note 9, at 140. The author observes that basing the right to severance *solely* upon a policy of promoting "industrial democracy" does not adequately explain the *limitation* of that right to groups which meet the Board-created requirements.

16. See Cohen, *The "Appropriate Unit" Under the National Labor Relations Act*, 39 COLUM. L. REV. 1110, 1121–31 (1939); Stix, *The Appropriate Unit Under the Wagner Act*, 23 WASH. U.L.Q. 156, 174–80 (1938); Taft, *The Problem of Structure in American Labor*, 27 AM. ECON. REV. 4 (1937); Note, *Selection of Employee Representatives Under the Wagner Act*, 32 ILL. L. REV. 593, 605–08 (1938); Note, *The "Globe Rule" Determining Appropriate Bargaining Units Under the Wagner Act*, 6 U. CHI. L. REV. 673, 674–77, 680–87 (1939); 47 YALE L.J. 122 (1937).

17. 13 N.L.R.B. 1252 (1939). See Krislov, *supra* note 10, at 233; 49 YALE L.J. 339 (1939).

18. See, *e.g.*, Rathbun, *supra* note 4, at 1028–29 (1950); Speech by William Green (President, American Federation of Labor) over C.B.S. Radio, May 21, 1939, in 84 CONG. REC. A2137, A2138 (1939) (submitted by Congressman Colmer): "[W]e ask that in any plant where a craft or a group of skilled workers exists [that] these workers be given the right to decide for themselves by their vote whether they wish to be represented in collective bargaining as a separate unit." Also see Letter From William Green to locals and affiliates of the American Federation of Labor, in 84 CONG. REC. A1312, A1313 (1939) (submitted by Congressman Anderson) (report on October, 1938, Federation convention indicating support of Federation for legislative change making severance elections mandatory).

19. International Minerals & Chem. Corp., 71 N.L.R.B. 878 (1946). See Rathbun, *supra* note 4, at 1029 ("In . . . [the *International Minerals* case] the Board quietly buried its *American Can* rule"). Under the original Wagner Act, the Board had been given broad power to determine the appropriate bargaining unit. National Labor Relations Act (Wagner Act) § 9(b), 49 Stat. 449, 453 (1935). In 1947, however, the Board's discretion to de-

has been limited to units of craft and departmental employees which had traditionally been represented by the AF of L unions.

The impetus for limiting craft severance to craft and departmental units was further bolstered by the fact that such groups had proved themselves workable bargaining units.[20] In addition, the individual employees within the groups practice skills which often require specialized training. Yet the wishes of the craftsmen are not often given special attention by unions bargaining for industrial units.[21] Thus, such employees are probably justified in seeking representation which can obtain wages higher than those of the unskilled workers who comprise the bulk of the large industrial units.[22]

2. The Indicia of A "True Craft" Unit

After the emergence of the principle of craft severance, a requirement that a severable unit contain true craftsmen gradually developed,[23] culminating in the Board's announcement in *American Potash* that all of the employees in a proposed craft unit would have to be true craftsmen or be in the direct line of progression to attainment of the craft skill.[24] The decisions since *American Potash* indicate three discernible aspects of the true craft test: (1) the trade must be one recognized by the Board as a true craft; (2) the employees in the proposed unit must possess the skills of a journeyman in the craft or be in the direct line of progression to the attainment of such skills; and (3) the employees in the proposed unit must be engaged primarily in the exercise of craft skills.

(a) The Trade Must Be Recognized As A True Craft

The question whether any given trade is a true craft within the meaning of *American Potash* has occasioned little discussion in Board opinions. Perhaps this is because the craft status of most trades is recognized by tradition and practice.[25] Thus, in cases in-

termine craft units was narrowed somewhat by the addition of a proviso precluding a finding that a craft unit was inappropriate based on a prior determination. Labor Management Relations Act (Taft-Hartley Act) § 9(b)(2), 61 Stat. 136, 143 (1947), 29 U.S.C. § 159(b)(2) (1958).

20. See generally, Krislov, *The NLRB on Craft Severance: One Year of American Potash*, 6 LAB. L.J. 275 (1955); Note, 12 WISC. L. REV. 367 (1937).

21. See Cox, *Some Aspects of the Labor-Management Relations Act*, 1947, 61 HARV. L. REV. 1, 36 (1947).

22. See Krislov, *supra* note 10, at 239.

23. See Krislov, *supra* note 10, at 236; Rathbun, *supra* note 4, at 1030.

24. 107 N.L.R.B. at 1423.

25. In the *American Potash* case, the Board defined a craft unit as "a distinct and homogeneous group of skilled journeymen craftsmen, working as such, together with their apprentices and/or helpers. To be a 'jour-

volving such trades as machinists, electricians, and pipefitters, there is no discussion of whether the trade is a "true craft" trade; the Board proceeds immediately to the question whether the alleged craftsmen measure up to the journeyman standards of the particular trade.[26] In some trades, such as lithography and photoengraving, the Board has merely relied on previous decisions where similar groups were permitted severance.[27] Similarly, the Board has held that certain groups such as refrigeration maintenance mechanics are not true craftsmen because such groups have previously been denied severance.[28]

However, in two instances the Board has reversed its earlier findings regarding craft status. Shortly after *American Potash*, the Board decided that a unit of welders did not qualify for severance because welding was not traditionally recognized as a true craft.[29] That determination served as a basis for denying severance to units of welders in subsequent cases.[30] Then in *Hughes Aircraft Co.*,[31] the Board held that welding would be considered a true craft. In so deciding, the Board relied on the development of welding as a distinctive trade, the increasing complexity of the skills involved accompanied by the need for special training, and the emergence of a labor organization which was specially devoted to the representation of welder units.[32] Similarly, the Board reversed an earlier rule that automotive mechanics were not true craftsmen, relying on findings of increasing complexity in the trade, evidenced by standards set by the United States Bureau of Apprenticeship and similar state agencies.[33]

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neyman craftsman' an individual must have a kind and degree of skill which is normally acquired only by undergoing a substantial period of apprenticeship or comparable training." 107 N.L.R.B. at 1423.

26. See, *e.g.*, Colgate-Palmolive Co., 120 N.L.R.B. 1567 (1958); E. I. du Pont de Nemours & Co., 117 N.L.R.B. 849 (1957); Koppers Co., 117 N.L.R.B. 422 (1957).

27. See, *e.g.*, Oswega Falls Corp., 112 N.L.R.B. 92, 93 n.3 (1955) (photoengravers); American Can Co., 110 N.L.R.B. 3, 7 n.8 and accompanying text (1954) (lithographic pressmen).

28. See, *e.g.*, Inland Cold Storage Co., 115 N.L.R.B. 973, 975 n.4 (1956).

29. Clayton & Lambert Mfg. Co., 111 N.L.R.B. 540 (1955).

30. See, *e.g.*, International Harvester Co., 114 N.L.R.B. 709, 710–11 (1955); Southern Paperboard Corp., 112 N.L.R.B. 302, 308 (1955). See also Rayonier, Inc., 111 N.L.R.B. 1090 (1955) (same rule applied in nonseverance case). However, the Board conceded that welders could sever along with a true craft group with whom the welders were employed. Clayton & Lambert Mfg. Co., 111 N.L.R.B. 540, 544–45 (1955).

31. 117 N.L.R.B. 98 (1957).

32. *Id.* at 99–101.

33. International Harvester Co., 119 N.L.R.B. 1709, 1710 (1958).

(b) The Employees In the Proposed Unit Must Possess the Skills of a Journeyman In the Craft or Be In the Direct Line of Progression to the Attainment of Such Skills

The Board will look behind the job titles given to employees in order to determine the specific skills they possess.[34] Emphasis is often placed on the presence or absence of an apprenticeship program,[35] although on-the-job training falling short of an apprenticeship program has sufficed in some instances.[36] Too rapid an advancement by workers to the top of the class will sometimes be found indicative of the absence of true craft skills.[37] The extent to which the employer's hiring practices are concerned with a prospective employee's prior experience is also relevant in determining whether the employees possess craft skills.[38] Finally, employees who do not meet craft journeyman standards are considered true craftsmen if they are in the direct line of progression to attainment of the craft skills.[39]

(c) The Employees In the Proposed Unit Must Actually Exercise Craft Skills

The Board requires evidence that the employees in the proposed unit are engaged primarily in performing the skills of their craft.[40] For example, the fact that certain electrical workers did not perform *all phases* of electrical work was considered to be a reason for not including them in a unit of electrical workers.[41] If the employees perform skills of their craft which involve a high de-

34. See CBS-Hytron, 115 N.L.R.B. 1702, 1706 (1956) ("mechanics" found to have skills of machinists and toolmakers); W. R. Grace & Co., 110 N.L.R.B. 85 (1954); Western Elec. Co., 108 N.L.R.B. 396 (1954).

35. See, *e.g.*, E. I. du Pont de Nemours & Co., 117 N.L.R.B. 849 (1957).

36. See, *e.g.*, Koppers Co., 117 N.L.R.B. 422 (1957); Universal Match Corp., 116 N.L.R.B. 1388 (1956); Remington Rand, Inc., 109 N.L.R.B. 622 (1954).

37. See, *e.g.*, W. R. Grace & Co., 110 N.L.R.B. 85 (1954).

38. See, *e.g.*, Rheem Mfg. Co., 110 N.L.R.B. 904 (1954).

39. See, *e.g.*, Sutherland Paper Co., 112 N.L.R.B. 622 (1955); Continental Can Co., 110 N.L.R.B. 409 (1954) (unit composed of trainees only found appropriate).

The Board will scrutinize evidence closely to determine whether what is claimed to be progression is actually an interchange of employees between the alleged craft group and non-craft groups. However, transfers and promotions to the craft group based on the worker's ability to perform the craft skills will not preclude a finding that the craft unit is appropriate. See E. I. du Pont de Nemours & Co., 117 N.L.R.B. 849, 851 (1957). Apparently, also, transfer of craftsmen into the production department during times of economic layoffs to protect seniority rights does not preclude a finding that such craftsmen actually exercise craft skills. See Allied Chem. & Dye Corp., 102 N.L.R.B. 129 (1953).

40. See, *e.g.*, Magic Chef, Inc., 108 N.L.R.B. 392 (1954).

41. Colgate-Palmolive Co., 120 N.L.R.B. 1567, 1571–72 (1958).

gree of precision and require the exercise of independent judgment, the workers will probably be found to be exercising true craft skills.[42] However, if the tasks are routine and repetitive, the opposite conclusion will likely follow.[43] The amount of precision work available in the employer's plant is an important factor in determining whether employees possessing special skills actually exercise craft skills.[44] Thus, it may be relevant in a particular case whether the employer contracts out its precision work to other companies.[45]

3. The Indicia of a "Traditional Department" Unit

In *American Potash,* the Board announced that certain non-craft groups could be severed if they were appropriate departmental units. The term "departmental" had previously been used only with reference to departments within a production group, such as toolrooms, and had not been applied to units which were severable on a different basis, such as powerhouse and truckdrivers' units.[46] The *American Potash* departmental severance rule, however, is applicable to all departmental units smaller than a plant in scope,[47] including powerhouse units[48] and truckdrivers' units.[49] In *American Potash,* the Board adverted to three general standards by which the appropriateness of departmental units would be judged: (1) whether the unit is "functionally distinct"; (2) whether the

42. See, *e.g.,* Western Elec. Co., 108 N.L.R.B. 396, 399 (1954) ("Tool and die makers, machinists, and model makers . . . required to work to very close tolerances, in some instances as low as ten-thousandths."); Mendon Co., 108 N.L.R.B. 310, 311 (1954) ("[W]ork to close tolerances, read blueprints, make sketches, and exercise independent judgment in the performance of their duties.").

43. See, *e.g.,* Western Elec. Co., 108 N.L.R.B. 396, 401 (1954) (precision machine operators, bench and machine operators, and heat treaters denied severance because they "are engaged in the performance of routine, repetitive operations not requiring the exercise of true craft skills.").

44. See American Potash & Chem. Corp., 117 N.L.R.B. 1508 (1957); F. L. Jacobs Co., 108 N.L.R.B. 544 (1954); Magic Chef, Inc., 108 N.L.R.B. 392 (1954).

45. See W. R. Grace & Co., 110 N.L.R.B. 85 (1954).

46. See, *e.g.,* Green Bay Drop Forge Co., 95 N.L.R.B. 1122, 1124 (1951). For a discussion of the different bases of severance for "departmental," powerhouse, and truckdriver units see Rathbun, *supra* note 4, at 1036 n.54.

47. Smaller-than-plant units which are not craft units are authorized by that portion of the Labor Management Relations Act which provides that the Board should decide whether the appropriate unit is "the employer unit, craft unit, plant unit, *or subdivision thereof* . . . ." Labor Management Relations Act (Taft-Hartley Act) § 9(b), 61 Stat. 136, 143 (1947), 29 U.S.C. § 159(b) (1958). (Emphasis added.)

48. See, *e.g.,* North Am. Aviation, Inc., 115 N.L.R.B. 1090 (1956); American Bosch Arma Corp., 115 N.L.R.B. 226 (1956); American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1425 (1954).

49. See, *e.g.,* American Can Co., 108 N.L.R.B. 1657 (1954); Tennessee Egg Co., 110 N.L.R.B. 189 (1954); Freidin, *supra* note 9, at 138.

unit is "identified with traditional trades or occupations," and (3) whether the unit possesses "craft-like characteristics."[50]

(a) Whether the Unit Is Functionally Distinct

Four factors predominate in the Board's determination of whether a unit is functionally distinct.

First, if a plant is so organized that employees in the proposed unit are physically segregated from other employees, it is probable that the Board will find that the unit is functionally distinct.[51] Conversely, evidence that employees in the proposed unit are dispersed throughout the plant militates against such a finding.[52] However, if factors other than physical separation indicate a homogenous group, the fact that the employees in the proposed unit are dispersed throughout the plant[53] or that the unit is physically divided by a screen for safety reasons,[54] does not preclude a finding that the unit is appropriate.

Second, evidence of administrative separation, while not conclusive,[55] will support a finding that the unit is functionally distinct. Such a finding may be based on the fact that the proposed unit is treated by the employer as a separate department,[56] that the employees in the unit have a separate foreman,[57] or that members of the unit are on a different pay basis than other employees in the plant.[58] On the other hand, evidence that the employees in the proposed unit "share the same immediate supervision, and enjoy the same terms and conditions of employment"[59] as other maintenance employees not included within the proposed unit, or that the proposed unit is diversely supervised,[60] may indicate

50. 107 N.L.R.B. at 1424.

51. See, *e.g.,* North Am. Aviation, Inc., 115 N.L.R.B. 1090 (1956); Kennard Corp., 114 N.L.R.B. 150 (1955); Spaulding Fibre Co., 111 N.L.R.B. 237 (1955); Consolidated Vullee Aircraft Corp., 108 N.L.R.B. 159 (1954); John Deere Planter Works of Deere & Co., 107 N.L.R.B. 1497 (1954).

52. See, *e.g.,* Monsanto Chem. Co., 119 N.L.R.B. 69 (1957). *Cf.* Hughes Aircraft Co., 115 N.L.R.B. 504 (1956); Mountain States Tel. & Tel. Co., 110 N.L.R.B. 1076 (1954).

53. See, *e.g.,* General Motors Corp., 114 N.L.R.B. 231 (1955).

54. Revere Copper & Brass, Inc., 111 N.L.R.B. 1241, 1245 n.4 (1955).

55. See Parker Bros. & Co., 117 N.L.R.B. 1462 (1957). See also American Can Co., 108 N.L.R.B. 1657, 1659 (1954) (dissenting opinion of Chairman Farmer).

56. See, *e.g.,* Hughes Aircraft Co., 115 N.L.R.B. 504 (1956).

57. See, *eg.,* Kennard Corp., 114 N.L.R.B. 150 (1955); Spaulding Fibre Co., 111 N.L.R.B. 237 (1955). Even though a unit was not otherwise administratively separate, the Board has considered it significant that the unit had a separate assistant foreman. North Am. Aviation, Inc., 115 N.L.R.B. 1090 (1956).

58. See Spaulding Fibre Co., 111 N.L.R.B. 237 (1955); John Deere Planter Works of Deere & Co., 107 N.L.R.B. 1497 (1954); A.P. Controls Corp., 108 N.L.R.B. 593 (1954).

59. Mountain States Tel. & Tel. Co., 110 N.L.R.B. 1076, 1077 (1954).

60. See Monsanto Chem. Co., 119 N.L.R.B. 69, 78 (1957).

such an identity of interests that the proposed unit cannot be considered "functionally distinct."

Third, evidence that the work performed by the employees in the proposed unit is closely integrated with that performed by other employees in the plant may indicate that the proposed unit is not functionally distinct.[61] However, the fact that employees in an otherwise appropriate departmental unit perform production work of a specialized nature does not necessarily indicate such a degree of integration with production employees as will preclude a finding that the unit is functionally distinct.[62] In many instances, the continuance of production may depend upon the function performed by the proposed departmental unit; but evidence of such integration does not preclude a finding that the departmental unit is functionally distinct.[63] Even though the work of the employees in the proposed unit may be closely integrated with the work of production employees,[64] it is unlikely that such integration will be accorded much weight if it is clear that the employees in the proposed unit perform a "specialized function."[65]

Fourth, evidence that there has been little or no employee interchange between the proposed unit and other groups is given some weight in determining whether the proposed unit is sufficiently distinct to justify separate representation.[66] Some employee inter-

61. See, *e.g.,* North Am. Aviation, Inc., 116 N.L.R.B. 1876, 1878 (1956) (motion picture unit denied severance because "these employees work as a team with employees from other departments. . . ."); *cf.* Bucyrus-Erie Co., 110 N.L.R.B. 314, 316 (1954) (maintenance electricians denied severance because they "regularly perform work relating to their crafts in conjunction with other craft maintenance employees.") The integration considered here should probably be defined as "overlapping or interrelation of physical operation" as distinguished from "economic interrelation." See Weiner, *The Appropriate Bargaining Unit,* N.Y.U. 6TH CONF. ON LAB. 515, 522 (1953). Compare Northrop Aircraft, Inc., 110 N.L.R.B. 1349, 1351 (1954). (Against the employer's contention that the unit should include all of its facilities, the Board found a unit limited to its Anaheim, Calif. plant appropriate, stating: "As there is no claim of an overriding integration before the Anaheim changes, we can only conclude there is not such integration now.")

62. See Union Steam Pump Co., 118 N.L.R.B. 689, 692–93 (1957) (fact that one toolmaker spent part time on a production process held not to preclude severance of unit or toolmaker's inclusion in it); Cessna Aircraft Co., 114 N.L.R.B. 1191 (1955); Kennard Corp., 114 N.L.R.B. 150 (1955); Warner Elec. Brake & Clutch Co., 111 N.L.R.B 268 (1955); John Deere Planter Works of Deere & Co., 107 N.L.R.B. 1497, 1498 (1954).

63. See American Bosch Arma Corp., 115 N.L.R.B. 226, 227–28 (1956); Spaulding Fibre Co., 111 N.L.R.B. 237, 239–40 (1955).

64. *Cf.* Sutherland Paper Co., 112 N.L.R.B. 622 (1955) (*craft* unit found appropriate despite close integration with production).

65. See St. Louis Car Co., 108 N.L.R.B. 1388, 1390 (1954).

66. See, *e.g.,* Cessna Aircraft Co., 114 N.L.R.B. 1191 (1955); A.P. Controls Corp., 108 N.L.R.B. 593 (1954).

change, however, will not preclude a determination that the departmental unit is appropriate,[67] provided the departmental employees spend the majority of their time in the usual duties of the department.[68] Moreover, transfers and promotions, unlike temporary interchanges, do not militate against a finding that the unit is functionally distinct.[69] The permissible limits of interchange were considered in three Board decisions subsequent to *American Potash*. The Board denied severance to two proposed truckdrivers' units on the ground that the extensive interchange with other departments was indicative of the fact that the truckdrivers were not a functionally distinct and separate unit.[70] In both cases, the Board concluded that evidence of temporary transfers across departmental lines indicated a lack of departmental homogeneity. Dissenting in both cases, Chairman Farmer was of the opinion that there was a functional homogeneity within the truckdrivers' units irrespective of individual turnover and that the practical effect of the majority decision would be to end such units.[71] Perhaps influenced by the pragmatic views of Chairman Farmer, the Board subsequently held that truckdrivers who spent 25% of their time in shipping department duties were not precluded from severance.[72] Thus, while interchange is some evidence of a lack of functional homogeneity, a fairly substantial interchange may be tolerated if other factors support the petition for severance.

(b) Whether the Unit Is Identified With Traditional Trades or Occupations

The Board has occasionally based a refusal to find a proposed departmental unit appropriate at least partially on the ground that the unit was not identified with a traditional trade or occupation. For example, severance has been denied to proposed departmental units of garage employees,[73] warehouse employees,[74] tractor and bulldozer operators,[75] refrigeration employees,[76] and one of two production departments[77] on the ground that such units were not

67. See The Schaible Co., 108 N.L.R.B. 2 (1954); John Deere Planter Works of Deere & Co., 107 N.L.R.B. 1497 (1954).
68. See Tennessee Egg Co., 110 N.L.R.B. 189 (1954).
69. See North Am. Aviation, Inc., 115 N.L.R.B. 1090, 1094 (1956).
70. Richmond Eng'ring Co., 108 N.L.R.B. 1659 (1954); American Can Co., 108 N.L.R.B. 1657 (1954).
71. Richmond Eng'ring Co., *supra* note 70, at 1658–59; American Can Co., *supra* note 70, at 1661–62.
72. Tennessee Egg Co., 110 N.L.R.B. 189 (1954).
73. Armour & Co., 110 N.L.R.B. 587 (1954).
74. Bethlehem Pac. Coast Steel Corp., 117 N.L.R.B. 579 (1957).
75. Kennecott Copper Corp., 114 N.L.R.B. 13 (1955).
76. Inland Cold Storage Co., 115 N.L.R.B. 973 (1956); H. Merck & Co., 111 N.L.R.B. 960 (1955).
77. Southbridge Finishing Co., 108 N.L.R.B. 54 (1954). See Rockwell Spring & Axle Co., 111 N.L.R.B. 331 (1955).

traditionally accorded separate representation. Similarly, the Board has relied upon previous decisions to establish the "traditionally recognized" status of such units as truckdrivers,[78] forge shop employees[79] and cameramen.[80] It seems clear that the requirement that the proposed unit be a traditionally recognized unit has reference to the generic group rather than the particular group seeking separate representation.[81] Perhaps the fact that similar units have traditionally been represented separately may be regarded as some evidence that the unit has a distinctive community of interests.[82]

(c) Whether the Unit Possesses Craft-Like Characteristics

In *American Potash,* the Board indicated that it intended to include in its newly-defined departmental units, groups which had acquired "craft-like characteristics."[83] Since *American Potash* departmental units have been found appropriate by relying on the fact that some of the employees possessed craft skills[84] while the denial of separate representation to other units has been based partially on the absence of such skills.[85] Yet, other units have been denied separate representation in spite of the "craft-like nature of their work,"[86] or found appropriate for separate representation although lacking such skills.[87] Perhaps the confusion about whether an *American Potash* departmental unit must contain a nucleus of skilled craftsmen[88] has been at least partially due to the Board's frequent reliance on pre-*Potash* craft-nucleus decisions—decisions in which the Board had termed a craft-nucleus unit a departmental unit.[89] It seems clear, however, that units

78. Tennessee Egg Co., 110 N.L.R.B. 189 (1954).
79. Wyman-Gordon Co., 117 N.L.R.B. 75 (1957).
80. Boeing Airplane Co., 116 N.L.R.B. 1101 (1956).
Interestingly, one group of cameramen, apparently without the requisite tradition in their own calling, was found appropriate by analogy to groups of lithographic employees and truckdrivers. Columbia Broadcasting System, Inc., 110 N.L.R.B. 2108 (1954).
81. See Freidin, *Craft and Splinter Units,* N.Y.U. 7TH CONF. ON LABOR 119, 125 (1954).
82. See Freidin, *supra* note 81, at 139; Weiner, *supra* note 61, at 531–32.
83. 107 N.L.R.B. at 1424.
84. See Boeing Airplane Co., 116 N.L.R.B. 1101, 1104 (1956) (departmental unit of motion picture employees containing a "nucleus of highly skilled craftsmen" found appropriate).
85. See North Am. Aviation, Inc., 116 N.L.R.B. 1876, 1878 (1956).
86. See Merck & Co., 111 N.L.R.B. 960, 962 (1955).
87. See Consolidated Vullee Aircraft Corp., 108 N.L.R.B. 159 (1954).
88. See note 84 *supra.*
89. See, *e.g.,* Wyman-Gordon Co., 117 N.L.R.B. 75 (1957), in which the Board cited Green Bay Drop Forge Co., 95 N.L.R.B. 1122 (1951). In *Green Bay,* the Board had found that a group of "crafty" hammermen provided a sufficient nucleus for severance of a "departmental unit." 95 N.L.R.B. at 1124.

which lack a craft nucleus[90] or other indicium of craft skills[91] can be found to be appropriate departmental units under the *American Potash* rules. Certainly departmental units such as the truckdrivers' units and powerhouse and boilerroom units, which comply with *American Potash*,[92] do not ordinarily meet the skill and training requirements of a craft.[93] Perhaps the only importance of the "craft-like characteristics" standard is that it provides an additional basis for the presentation of persuasive evidence that a unit of a type not previously accorded separate representation should be found appropriate.[94]

B. THE RULE PROHIBITING MULTI-CRAFT SEVERANCE

One of the requirements for severance of craft units set forth in the *American Potash* case was that "all the craftsmen included in the unit must be practitioners of the same allied craft."[95] This rule has been applied to prevent an existing craft representative from adding other crafts to its unit.[96] The rule originated prior to *American Potash*[97] and seems to have been based on the theory that a multi-craft unit does not possess sufficient homogeneity to bargain collectively.[98] However, the rule against multi-craft units is not applied in non-severance cases, such as original certification cases, where surely the need to find a unit with sufficient homogeneity to bargain collectively is as important as in severance cases.[99]

A possible explanation for the distinction is that the need to preserve stability for the existing unit in severance cases requires the Board to look more closely at the functional homogeneity of the proposed unit than in non-severance cases. Thus, even though a multi-craft group may have sufficient homogeneity to justify a

90. See General Refractories Co., 117 N.L.R.B. 81 (1957).
91. See Union Steam Pump Co., 118 N.L.R.B. 689 (1957) (toolroom unit appropriate even though no special training required).
92. See nn. 48–49 *supra*.
93. See Krislov, *Administrative Approaches to Craft Severance*, 5 LAB. L.J. 231, 236 (1954); Rathbun, *The Taft-Hartley Act and Craft Unit Bargaining*, 59 YALE L.J. 1023, 1036–37 (1950).
94. See Columbia Broadcasting System, Inc., 110 N.L.R.B. 2108, 2111 (1954).
95. 107 N.L.R.B. at 1423. See Union Steam Pump Co., 118 N.L.R.B. 689 (1957); Krislov, *supra* note 93, at 235.
96. National Cash Register Co., 121 N.L.R.B. 408 (1958); Raybestos-Manhatten, Inc., 71 N.L.R.B. 673 (1946).
97. See Allied Chem. & Dye Corp., 102 N.L.R.B. 129, 132 (1953).
98. See George S. Mepham Corp., 78 N.L.R.B. 1081 (1948).
99. See, *e.g.*, Chrysler Corp., 119 N.L.R.B. 1312 (1958); United States Lime Corp., 86 N.L.R.B. 724 (1949). Some earlier decisions were contra on this point. *E.g.*, Atlanta Oak Flooring Co., 60 N.L.R.B. 1343 (1945); Monsanto Chem. Co., 55 N.L.R.B. 1452 (1944); Bohn Alum. & Brass Corp., 52 N.L.R.B. 1305 (1943).

finding that it is appropriate if it has not previously been represented, the interests of such a group may well be regarded as not sufficiently distinctive from the interests of all the employees in an existing unit to merit breaking up the industrial unit.[100]

C. Scope of the Severable Departmental or Craft Unit

Under present Board policy, a departmental unit must include all departmental employees.[101] Prior to *American Potash*, a departmental unit, such as a toolroom, was inappropriate unless it included all the employees with similar skills in the existing broader unit.[102] However, under the *American Potash* doctrine, a departmental unit may be appropriate for severance even though there are other similarly-skilled employees in the broader unit, if the proposed unit is functionally distinct.[103] Thus, any question respecting the scope of a departmental unit in a particular plant is now resolved synonymously with the identification of the department.

A severable craft unit must include all the employees performing the same or similar craft skills within the existing unit.[104] Two major areas of controversy in the administration of this rule are: (1) defining the scope of an existing unit, and (2) determining who are craftsmen with the same or similar skills.

100. See Container Corp. of America, 121 N.L.R.B. 249, 253 (1958), where the Board stated:

> In our opinion, the maintenance department employees, including the electricians, instrumentmen, pipefitters, and fitter welders, possess interests and duties *sufficiently distinct* from those of the production employees to warrant their establishment in a separate unit where, as here, there is no history of collective bargaining on a broader basis.

(Emphasis added.) The idea of viewing the right to separate representation as a matter of degree, dependent upon the circumstances, is supported by the Board doctrine regarding technical units. The Board has held that since technical employees have a more distinctive community of interests than craft and departmental employees, the "traditional union" requirements, applicable in craft and departmental severance cases, is not applicable to severance of technical units. See Westinghouse Elec. Corp., 118 N.L.R.B. 1043 (1957).

101. General Motors Corp., 114 N.L.R.B. 231, 233 (1955); 21 N.L.R.B. Ann. Rep. 55 (1956).

102. See, *e.g.*, Teletype Corp., 79 N.L.R.B. 1044 (1948).

103. See The Gemex Corp., 120 N.L.R.B. 46 (1948). The four indicia of functional distinctiveness are physical separation, administrative separation, lack of integration, and lack of interchange with other groups. See pp. 399–401 *supra*. In the *Gemex* case, the Board held the proposed unit appropriate for severance despite the presence of similarly skilled employees in other parts of the plant, emphasizing the separate supervision (administrative separation) of the proposed unit.

104. American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1423 (1954)

1. Defining the Scope of An Existing Unit

An issue often hotly debated is whether an existing unit is plant-wide, employer-wide, or multi-employer-wide in scope.[105] In the *American Potash* case, the Board said it would require all workers of the same craft in the *plant* to sever as a unit.[106] However, the rule requiring the severable unit to be coextensive with the existing unit had been previously applied to include units broader than the plant unit.[107] Similarly, since *American Potash,* the Board has held that the scope of a severable unit must be coextensive with an existing multi-employer unit.[108] Therefore it is apparent that the Board, in defining a severable craft unit in *American Potash,* attached no particular significance to the use of the word "plant" in its explanation of the scope of the existing unit.

If the existing unit is found to be a large multi-employer or multi-plant unit, craft severance may be practically impossible because of the difficulty of organizing workers simultaneously for a successful election on such a broad scale.[109] Moreover, because the existence of a multi-employer or multi-plant unit is presently determined by the Board in accordance with the bargaining intent of the employer, such determinations are largely within the control of the employer and the union that bargains for the broader unit.[110] Therefore, the employer and the industrial union may have it within their power to make craft severance virtually impossible.

The rule requiring a severable unit to be coextensive with the existing unit, when applied to multi-plant and multi-employer units imposes insuperable practical obstacles to severance. Thus that rule seems to contradict the Board's policy statements in *American Potash* regarding the need for severance. In broadening the availability of severance, the Board relied on the "needs of the skilled craftsmen for a bargaining representative which by history, tradition, and experience would be better equipped to devote

105. See, *e.g.*, B. & B. Novelty Co. (9–RC–4068, Sept. 7, 1960); Eaton Mfg. Co., 121 N.L.R.B. 813 (1958); Evans Pipe Co., 121 N.L.R.B. 15 (1958); Continental Can Co., 110 N.L.R.B. 1042 (1954).

106. 107 N.L.R.B. at 1423.

107. See, *e.g.*, Ethyl Corp., 80 N.L.R.B. 9 (1948).

108. Friden Calculating Mach. Co., 110 N.L.R.B. 1618, 1620 (1954).

109. See Krislov, *supra* note 93, at 235; *Cf.* Krislov, *New Organizing by Unions in the 1950's,* 83 MONTHLY LAB. REV. 922, 924 (Sept. 1960).

110. The existence of a multi-employer bargaining unit appears to turn on whether the employer intended to be bound by the results of joint bargaining. See Evans Pipe Co., 121 N.L.R.B. 15 (1958); Jones, *The NLRB & the Multiemployer Unit,* 5 LAB. L.J. 34, 35–38 (1954); 21 N.L.R.B. ANN. REP. 58–59 (1956). The existence of a single employer unit covering more than one plant appears to turn on whether the employer and union intended to treat all the employer's plants as one unit. See Eaton Mfg. Co., 121 N.L.R.B. 813 (1958).

its efforts to the special problems peculiar to the specific craft involved."[111] If an industrial union representing a plant-wide unit is likely to be unresponsive to the special problems of the craftsmen, certainly an industrial union representing a multi-employer unit is no more likely to be responsive to such needs. Yet under the current rule, it is more difficult for craftsmen within an existing multi-employer or multi-plant unit to secure craft representation than for craftsmen within an existing plant unit. Probably the primary explanation for a rule which has this result is the fact that it protects the larger bargaining units from piecemeal attack,[112] and thus preserves the stability of existing bargaining relationships.[113] A possible justification for protecting larger units from such attack could be found in the argument that if an employer has delegated his bargaining power to an employer association, any severable unit should be broad enough in scope to bargain with such association. Such a result would undoubtedly be more convenient for the employers involved. But in *American Potash* the Board declared that the interest of craftsmen in separate representation was paramount to any interest in stability.[114] And if a high degree of integration in the employer's operations is not a sufficient basis for precluding severance,[115] inconvenience to the employer in having to bargain with a separate unit should not be a sufficient basis for making severance practically impossible.

2. Determining Who Are Craftsmen With the Same or Similar Skills

In determining whether a proposed unit complies with the requirement that it be coextensive with the existing unit, the Board has employed a variety of tests to determine whether all craftsmen in the existing unit with the same or similar skills have been included in the proposed unit. Thus, employees in the plant who are in the direct line of progression to the particular craft, such as apprentices or trainees, must be included in the severed unit.[116] Although determining which employees are in a "direct line of progression" may often be difficult, an even more difficult problem arises in cases where two or more craft groups within the existing unit perform similar skills. Where the Board has held such

111. 107 N.L.R.B. at 1420.
112. See Krislov, *supra* note 93, at 235.
113. See Jones, *supra* note 110, at 38.
114. 107 N.L.R.B. at 1422–23.
115. In the *American Potash* case, the Board decided that integration of the industry concerned was not a sufficient basis on which to conclude that craft units would be appropriate. 107 N.L.R.B. at 1419–22.
116. See, *e.g.*, Campbell Soup Co., 109 N.L.R.B. 475 (1954); Minneapolis-Moline Co., 108 N.L.R.B. 1458 (1954).

groups to be distinct, it has emphasized such factors as separate supervision of each group.[117] Even where there are transfers and promotions between the groups, a slight variation of skill may preserve to each group its "functional identity."[118] In cases where two groups have been found to constitute one craft, however, the Board has emphasized the *similarity* of their skills[119] and the fact that there were some transfers between the groups.[120] Evidence that the groups are separately supervised[121] or that they are on different pay systems[122] has apparently not been deemed sufficient to treat them separately in such cases.

It is impossible to predict from Board opinions how much weight it will give to such factors as similarity of skill, separate supervision, and transfers. For example, in *General Motors Co.*,[123] the Board found that a unit of pattern makers did not have to include die makers in order to be appropriate.[124] In *Cessna Aircraft Co.*,[125] however, the Board found that a unit of tool and die makers was not appropriate because it did not include, among others, a pattern maker.[126] Although in the *General Motors* opinion the Board adverted to the fact that it had previously found pattern makers separately appropriate in the automobile industry,[127] it did not make any distinction in the *Cessna* opinion that would indicate a reason for different treatment of pattern makers in the aircraft industry. While in *General Motors* the Board emphasized the fact that the die makers and pattern makers were separately located and separately supervised,[128] nothing in the opinion indicates that the same factors were not present in *Cessna*.[129] Whatever the reasons might be for the different conclusions in *General Motors* and *Cessna*, it is not apparent from the opinions.

D. Relation of Craft and Departmental Units

In the *American Potash* case, the Board held that craftsmen who were within a departmental unit would be included with the de-

117. *E.g.*, General Motors Corp., 114 N.L.R.B. 181 (1955); Rheem Mfg. Co., 110 N.L.R.B. 904 (1954).
118. E. I. du Pont de Nemours & Co., 117 N.L.R.B. 849, 851 (1957).
119. See, *e.g.*, Cessna Aircraft Co., 114 N.L.R.B. 1191, 1193 (1955).
120. See, *e.g.*, Columbia Broadcasting System, Inc., 115 N.L.R.B. 1702, 1706 (1956); Bucyrus-Erie Co., 110 N.L.R.B. 314, 315 (1954).
121. See Columbia Broadcasting System, Inc., *supra* note 120, at 1705.
122. See Bucyrus-Erie Co., 110 N.L.R.B. 314, 315 (1954).
123. 114 N.L.R.B. 181 (1955).
124. *Id.* at 183.
125. 114 N.L.R.B. 1191 (1955).
126. *Id.* at 1193 n.7.
127. 114 N.L.R.B. at 183 n.10 and accompanying text.
128. *Id.* at 183.
129. See 114 N.L.R.B. at 1193.

partmental unit rather than the recognized craft unit.[130] Member Murdock, dissenting from this aspect of *American Potash*, was of the opinion that whenever a proposed unit included craftsmen, it should be judged by *craft* standards, including the requirement that the proposed unit include all such craftsmen within the existing unit.[131] In implementing *American Potash*, the Board has granted elections to departmental units containing a large craft segment in a number of cases where the craftsmen in the department could not have severed independently because there were other similarly skilled craftsmen in other parts of the existing unit.[132] Thus, to some extent, the fact that craftsmen may sever as a part of a departmental unit has provided an escape from the rule which requires a severable craft unit to be coextensive with the existing unit. On the other hand, the severability of departmental units has created a potential danger of conflict where two unions may attempt simultaneously to organize and represent an "appropriate" severable unit—one on a craft basis and the other on a departmental basis. In this situation, the Board should mold its policies in favor of the proposed unit with the greater need for severance.

The basic reason for craft severance would appear to be that craftsmen have a skill which may not be adequately protected by an industrial union.[133] Departmental bargaining, on the other hand, is justified primarily on the basis that the functional homogeneity of the departmental employees makes separate bargaining *workable*[134]—probably as a concession to the traditional separate

130. 107 N.L.R.B. at 1424–25. The Board granted an IAM petition for a unit of electricians and a petition by the Operating Engineers for a powerhouse unit. An electrician stationed in the powerhouse was included in the powerhouse unit.

131. 107 N.L.R.B. at 1427–28.

132. See, *e.g.*, Cessna Aircraft Co., 114 N.L.R.B. 1191, 1193–94 (1955). *Cf.* General Motors Corp., 114 N.L.R.B. 234 (1955), where the Board held that the petitioning union could add to its previously certified craft unit other, non-craft, employees since the new proposed unit was an appropriate departmental unit. Member Murdock, dissenting, stated that:

> [T]here is nothing in the long run which would be more destructive of the respect for craft rights than to dilute the craft, and its special interests, as in the manner produced by the instant majority decision.

Id. at 239.

133. See p. 395 *supra*.

134. In Mack, Judson, Voehringer Co. of No. Car., Inc., 110 N.L.R.B. 437 (1954) (non-severance case), knitters (not craftsmen) were found to constitute an appropriate separate group because a knitter's earnings may differ according to the particular machine to which he is assigned or the kind of hosiery knitted. "Consequently, knitters, unlike auxiliary employees, have a special interest in establishing equitable rules governing transfer between machines." *Id.* at 440. However, the fact that a departmental unit is separately supervised, while perhaps supporting the *workability* of

representation of such groups. Thus, because of the greater *need* for separate *craft unit* bargaining, the Board should shape its policies to prefer severance of proposed craft units over severance of proposed departmental units. Adoption of such a policy should be accompanied by a modification of the rule that a severable craft unit must include all members of an existing unit, in order to assure that separate bargaining for craftsmen within a multi-plant or multi-employer industrial unit becomes a practical reality. A more realistic approach would be to permit severance of any craft unit which could workably function separately without regard to the scope of the existing unit.

II. UNION QUALIFICATION TO REPRESENT THE SEVERANCE UNIT

The principal reason for allowing severance is that employee groups with a special need, or with demonstrated ability to bargain as a unit, should not be denied the freedom to choose *separate* representation. Against the interests of these employee groups, however, must be balanced the public and private interests in stable industrial relations. If the severance rules related only to the composition and scope of a proposed unit, an ambitious union eager to expand its membership could use severance as a means of establishing itself in a plant. From this initial foothold, the union could organize other employees in the plant,[135] with all the dangers of instability that such organizational activities entail. Because of this threat which liberal severance rules would pose to stability in industrial relations,[136] it seems proper that the Board will permit severance only when the union's objective is separate representation of the proposed unit.

The "traditional union" requirement, first enunciated in *American Potash*,[137] was probably designed to prevent severance except where there is a reasonable probability that separate representation would be the ultimate result.[138] Under the traditional union rule, a severance petition will be denied unless the petitioning union is found traditionally to have represented similar units[139] or, if

separate bargaining, hardly supports a *need* for separate bargaining. Many segments of a production division may be separately supervised but this fact would not support severance of such groups.

135. See Krislov, *supra* note 93, at 235–36 (1954).

136. See notes 4–6 *supra* and accompanying text.

137. 107 N.L.R.B. at 1422. Compare International Harvester Co., 92 N.L.R.B. 1504, 1507 n.12 (1951) (contention that petition should be denied because petitioner was without "jurisdiction" to represent employees in the proposed unit held to be without merit).

138. See Industrial Rayon Corp., 46 L.R.R.M. 1345 (1960).

139. Ordinarily, the issue of whether a union has traditionally repre-

the petitioner is a newly formed union, unless the available evidence indicates that the union's objective is representation of the proposed unit as a separate unit.[140] If either of these requirements is met, it is less likely that the petitioning union will use the severed unit as a means of effecting broader organization in the plant.[141]

Conceivably, the traditional union rule could also be based on a policy of providing the severed unit with an experienced representative,[142] or a policy of preventing jurisdictional disputes among craft unions regarding the right to represent certain craft groups.[143] Since both of these policies would seem equally applicable to any case involving a question of representation, however, and since the traditional union rule is applied only in severance cases,[144] the rule does not seem to be based upon these policies. Furthermore, because the Board has held that a newly formed union can meet the traditional union requirement,[145] and because a union need not have bargained for employees in the in-

sented employee groups similar to that which it seeks to sever is resolved by official notice. See, *e.g.*, Union Steam Pump Co., 118 N.L.R.B. 689, 691 (1957); Davison Chem. Co., 110 N.L.R.B. 85 (1954). Probably in most cases involving the older unions and the craft groups which are well established crafts, no evidence would be admitted to contradict what is known by administrative experience. See Campbell Soup Co., 109 N.L.R.B. 475, 478 (1954). However, in Monsanto Chem. Co., 119 N.L.R.B. 69 (1957), the Board remanded the case to the Regional Director for further findings on the issue of whether the petitioner had traditionally represented welders' units, "it appearing that more than one union has traditionally represented welders . . . ." *Id.* at 78. There is little authority as to the degree of similarity which must be found between the proposed unit and units which the petitioner has previously represented. The Board has held that a union which has traditionally represented craft units may, consistently with the traditional union rule, represent departmental units composed of similar employees. General Motors Corp. Chevrolet Muncie Div., 114 N.L.R.B. 231, 232 (1955). Also, if Union *A*, which merged into Union *B*, had traditionally represented the workers of a given craft, Union *B* would now be considered qualified to represent that craft. See Wyman-Gordon Co., 117 N.L.R.B. 75, 79 n.12 (1957).

140. See, *e.g.*, Friden Calculating Machine Co., 110 N.L.R.B. 1618, 1619 (1954). If the new union's constitution would permit representation of units broader in scope than the one it seeks to represent, the petition would probably be denied. Thus, where a union's constitution permitted representation of any skilled tradesman, severance was denied. Fort Dic Casting Corp., 115 N.L.R.B. 1749, 1750 (1956).

141. See Krislov, *supra* note 93, at 238.

142. See Elgin National Watch Co., 109 N.L.R.B. 273, 274–75 (1954), *overruled,* Friden Calculating Mach. Co., 110 N.L.R.B. 1618 (1954).

143. See Krislov, *supra* note 93, at 239.

144. *E.g.*, Industrial Rayon Corp., 46 L.R.R.M. 1345 (1960); Container Corp. of America, 121 N.L.R.B. 249 (1958); Mack, Judson, Voehringer Co., 110 N.L.R.B. 437 (1954); Campbell Soup Co., 109 N.L.R.B. 518 (1954).

145. *E.g.*, Colgate-Palmolive Co., 120 N.L.R.B. 1567 (1958); Cessna Aircraft Co., 114 N.L.R.B. 1191 (1955); Friden Calculating Mach. Co., 110 N.L.R.B. 1618 (1954); Krislov, *The NLRB on Craft Severance: One Year of American Potash,* 6 LAB. L.J. 275, 276 (1955).

dustry in question to meet the requirement,[146] it is clear that experience is not the basis for the rule. Therefore, probably the only purpose for the traditional union rule is to prevent unions from using severance for any objective other than separate representation of the severed unit.

The traditional union rule is not the only means by which the Board has sought to accomplish its separate representation objective. In *Mills Industries, Inc.*,[147] the Board denied a petition by the International Association of Machinists (IAM) to represent a unit of machine repairmen even though the union traditionally represented such units. The IAM had represented a plant-wide unit including these machine repairmen from 1944 to 1952. In a 1952 election, the IAM was defeated by the International Brotherhood of Electrical Workers (IBEW) in a representation election in the plant unit. The Board was of the opinion that the IAM's 1954 petition was "mainly concerned with a desire to *reestablish* itself as the plant's overall bargaining representative, rather than as a craft representative."[148] Therefore, severance was denied. In *Westinghouse Elec. Corp.*,[149] the Westinghouse Salaried Employees Association, an affiliate of the Federation of Westinghouse Independent Salaried Unions, petitioned to sever a unit composed of draftsmen, tool designers, technical assistants, and inspectors from the salaried unit at one of the employer's plants. On two previous occasions, the petitioner had participated, by itself or through its parent Federation, in representation hearings at the same plant. On both of these occasions, the petitioner had contended that all salaried employees at the plant comprised the appropriate unit. The Board denied the petition for severance, stating: "[T]he Petitioner, having failed to win the salaried unit on two previous occasions, is now seeking to gain it on a piecemeal basis."[150] The Board also stated in its findings that the petition had been amended during the hearing in this case to add the inspectors and that the petitioner had made several alternative requests. The Board indicated that these factors constituted further evidence that the union's motive was inconsistent with separate representation of the proposed unit.[151] In *Scott Paper Co.*,[152] the IBEW's petition to

146. Southern Paperboard Corp., 112 N.L.R.B. 302, 303–04 (1955).
147. 108 N.L.R.B. 282 (1954).
148. *Id.* at 283.
149. 115 N.L.R.B. 1381 (1956).
150. *Id.* at 1383.
151. Although the union representing the existing unit contended that the petition should be denied because the petitioner did not meet the traditional union requirement, the Board did not base its holding on that rule, probably because the proposed unit was a technical unit and the traditional union requirement is inapplicable to such units. *E.g.*, Westinghouse Elec. Corp., 118 N.L.R.B. 1043 (1957).
152. 115 N.L.R.B. 15 (1956).

sever a unit including electricians, instrument men, and power department employees was denied. IBEW and two other unions had jointly bargained as representatives of a plant-wide unit in the employer's plant for ten years. While the opinion was couched in language of estoppel, the Board's conclusion was probably motivated by the belief that the IBEW was using severance as a step towards eventual sole representation of the entire plant unit.[153]

The *Mills Industries, Westinghouse,* and *Scott Paper* cases clearly support the proposition that the Board will deny a severance petition if there is satisfactory evidence that the petitioning union's motive in seeking severance is inconsistent with separate representation of the proposed unit. Furthermore, *Mills Industries* and *Scott Paper* indicate that this result will follow even if the formal requirements of the traditional union rule are met.

In each of the cases, it was significant that the petitioner had either argued in a previous representation hearing or by its conduct had indicated that a unit broader than the one sought to be severed was appropriate for collective bargaining. However, in *General Refractories Co.,*[154] the Board summarily dismissed the contention that because the IAM represented a number of industrial units in other plants, it should be disqualified from severing a machine shop unit. It is possible that the IAM, as an organizer of industrial units, had an interest in representation which was inconsistent with continued separate representation of the proposed unit—an interest similar to that which the Board inferred in the three previous cases. The only distinction between those cases and *General Refractories* is that in the latter case the IAM had no interest which was inconsistent with separate representation with respect to the *particular plant* under consideration. This distinction

153. The entire Scott Paper Co. opinion, after a statement of the facts, is as follows:

> The Joint Intervenors contend that the petitions should be dismissed on the ground, among others, that, through its participation as one of the joint representatives both in drawing up bargaining demands and actually bargaining with the Employer during the pendency of the petitions, the Petitioner waived its right to rely, or estopped itself from relying, on the instant petitions. We agree. The Petitioner has been bargaining with the Employer (together the the Joint Intervenors) for the existing plantwide unit, while at the same time seeking to sever part of that unit. In so bargaining for the overall unit, the Petitioner has, in our view, taken a position wholly inconsistent with its attempt to establish that a question concerning representation exists with respect to the employees it seeks to sever. We do not believe that it would effectuate the policies of the Act to permit the Petitioner to proceed with its petitions in view of this inconsistency. Accordingly, we shall dismiss the petitions.

115 N.L.R.B. at 17. (Footnotes omitted). See American Radiator & Stand. Sanitary Corp., 119 N.L.R.B. 204 (1957); International Paper Co., 115 N. L.R.B. 17 (1956).

154. 117 N.L.R.B. 81 (1957).

probably justifies the different result since the need for and workability of separate craft or departmental representation may differ from plant to plant.[155] However, it would seem legitimate for the Board to give closer examination to the motives of a union which is known to represent both craft and plant-wide units than to those of a union which is known to adhere closely to separate craft representation.

It is improbable that the fact a petition suggests several unit alternatives would, by itself, be given much weight in determining whether the union's motive is to use severance for a purpose other than separate representation. Alternative requests are commonly made and usually pass without comment.[156] For example, in *American Cyanamid Co.*,[157] the IAM petitioned for eighteen separate craft units, or, in the alternative, a single maintenance unit. The Board granted severance to some of the proposed units without commenting about whether the alternative character of the request indicated a purpose on the part of IAM inconsistent with separate representation of the severed units.

The Board should frankly acknowledge that the purpose of the traditional union requirement is to provide some assurance that the union's objective is separate representation of the severance unit. Furthermore, the Board should make it clear that it considers the union's objectives a legitimate line of inquiry in severance cases and that it will consider any evidence which fairly bears on the union's objective.

III. IMMUNITY OF CERTAIN INDUSTRIES FROM SEVERANCE

The rule that the industrial units of certain entire industries must remain free from severance was first set forth by the Board in *National Tube Co.*[158] There the Board denied a petition for severance of a unit of bricklayers from a plant-wide industrial unit at a plant engaged in basic steel production. The decision was based on findings that industrial unit bargaining prevailed in the steel industry and that operations in the industry were highly integrated, and it had the effect of foreclosing severance in the entire industry. Subsequently, the aluminum, lumber and wet-milling in-

155. In its capacity as representative of plant-wide production and maintenance units, the IAM frequently opposes severance of craft groups and argues that the only appropriate unit is a plant-wide unit. See, *e.g.*, Union Steam Pump Co., 118 N.L.R.B. 689 (1957); Rheem Mfg. Co., 110 N.L.R.B. 904 (1954); Continental Can Co., 110 N.L.R.B. 409 (1954).

156. See, *e.g.*, Monsanto Chem. Co., 119 N.L.R.B. 69 (1957); Beaunit Mills, Inc., 111 N.L.R.B. 963 (1955).

157. 110 N.L.R.B. 89 (1954).

158. 76 N.L.R.B. 1199 (1948).

dustries were also immunized from severance under the *National Tube* doctrine.[159] Because immunization of industrial units presented a serious obstacle to the separate representation of craftsmen, the Board in *American Potash* refused to deny severance despite findings of a prevailing pattern of industrial unit bargaining and integration of operations in the industry.[160] However, the Board specifically stated that it would continue to immunize the industries to which the *National Tube* doctrine had already been applied.[161]

The Board has adhered strictly to the position it took in *American Potash*. The aluminum, lumber, steel and wet-milling plants have retained their immunity;[162] but the Board has maintained

159. See Permanente Metals Corp., 89 N.L.R.B. 804 (1950) (aluminum); Weyerhaeuser Timber Co., 87 N.L.R.B. 1076 (1949) (lumber); Corn Products Refining Co., 80 N.L.R.B. 362 (1948) (wet-milling).

160. 107 N.L.R.B. at 1420–21: The Board reasoned that in *National Tube*, "the Board . . . [found] that in the basic steel industry, because of prevailing industry pattern and integration of operations, craft units were inappropriate. However, this finding had the effect of permanently foreclosing the possibility of establishing craft or departmental units in an entire industry by freezing that industry into an industrial unit for bargaining purposes. This result, because of its seeming inconsistency with the legislative intent, made it necessary for us to reappraise the entire situation. . . . [W]e feel that the right of separate representation should not be denied the members of a craft group merely because they are employed in an industry which involves highly integrated production processes and in which the prevailing pattern of bargaining is industrial in character."

161. *Id.* at 1422: "[W]e shall continue to decline to entertain petitions for craft or departmental severance in those industries to which the Board has already applied *National Tube* and where plantwide bargaining prevails."

162. See 23 N.L.R.B. ANN. REP. 35–36 (1958). The only issue has been whether a particular plant was within the immune industry. Steel industry immunity has been limited to plants producing rolled steel and sheet metal products from ore. Mesta Mach. Co., 120 N.L.R.B. 1791 (1958); see General Refractories Co., 117 N.L.R.B. 81 (1957) (contention that plant should be immune because it operated "in tandem" with basic steel industry rejected). Aluminum industry immunity has been limited to "basic aluminum" plants engaged in the reduction of raw ore and rolling mill operations. See, *e.g.*, Harvey Aluminum, Inc., 114 N.L.R.B. 935 (1955); Revere Copper & Brass, Inc., 111 N.L.R.B. 1241 (1955). Lumber industry immunity is applicable only to "employers engaged . . . principally in the business of cutting trees and processing logs into finished lumber." J. H. Baxter & Co., 118 N.L.R.B. 682, 683 (1957). See Oroply Corp., 121 N.L.R.B. 1067 (1958); Arcata Plywood Corp., 120 N. L.R.B. 1648 (1958); Seattle Cedar Lumber Mfg. Co., 112 N.L.R.B. 54 (1955). What, if any, difference the Board intends as between steel and aluminum on one hand and lumber on the other by stating in the former instance that the relevant question is whether the *plant* is engaged in "basic steel" or "basic aluminum" and in the latter that the relevant question is whether the *company* is engaged in "primary lumber" is not clear from the opinions. It would seem more practical to consider whether each plant should be immune from severance since a company may engage in diversified enterprises in some parts of which there is no reason for immunity.

its policy position by refusing in all other cases to deny severance despite evidence of a prevailing pattern of industrial unit bargaining or integration of operations in the industry.[163]

The seeming inconsistency in the Board's treatment of industries which apparently are similar to those immunized under the *National Tube* doctrine has resulted in court of appeal review of the question of immunity on two occasions. In *NLRB v. Pittsburgh Plate Glass Co.*,[164] the Fourth Circuit refused to enforce a Board order to bargain with a craft union which had won a severance election. Because the evidence indicated that industrial unit bargaining prevailed in the flat glass industry and that the employer's operations were highly integrated, the court held that the Board had been arbitrary in refusing to hold the industrial unit immune.[165] In *NLRB v. Weyerhaeuser Co.*,[166] the Seventh Circuit rejected the contention that the Board had been arbitrary in refusing to consider certain evidence of integration and enforced a Board order to bargain with the elected craft representative. *Pittsburgh Plate Glass* was distinguished on the ground that in that case the Board found the operations in the industry to be integrated, while in *Weyerhaeuser* the Board found, on competent evidence, that the operations in the industry were not integrated.[167]

While the integration of operations played an important part in the *development* of immunity in the aluminum, lumber, steel, and wet-milling industries, a careful reading of *American Potash* reveals that continuation of the immunity granted those four industries has been based upon the Board's judgment that it would be unwise to upset a firmly established pattern of industrial unit

163. *E.g.*, Bay City Div., 116 N.L.R.B. 1602, 1605 (1956) (magnesium industry); San Manuel Copper Corp., 116 N.L.R.B. 1153, 1155–56 (1956) (copper mining and smelting industry); United States Smelting, Refining & Mining Co., 116 N.L.R.B. 661, 663 (1956) (gold dredging industry); E. I. Dupont de Nemours & Co., 111 N.L.R.B. 649, 650 (1955) (basic atomic energy industry); Southwestern Portland Cement Co., 110 N.L.R.B. 1388, 1389–90 (1954) (cement industry); T. C. Wheaton Co., 109 N.L.R.B. 158 n.1 (1954) (glass industry). The Board has held an offer of proof concerning the area bargaining pattern in the soap industry properly rejected by the hearing officer. Colgate-Palmolive Co., 120 N.L.R.B. 1567, 1568 n.2 (1958). See also Bethlehem Pacific Coast Steel Corp., 117 N.L.R.B. 579, 580 n.6 (1957).

164. 270 F.2d 167 (4th Cir. 1959), *cert. denied*, 361 U.S. 943 (1960), *denying enforcement of* 121 N.L.R.B. 758 (1958). The Board's representation decision holding the craft unit appropriate is published in 117 N.L.R.B. 1728 (1957).

165. 270 F.2d at 174.

166. 276 F.2d 865 (7th Cir.), *cert. denied*, 364 U.S. 879 (1960), *enforcing* Ace Folding Box Corp., 124 N.L.R.B. 23 (1959). The Board's decision in the representation proceeding was not published but pertinent parts of it are noted in 276 F.2d at 868 n.1.

167. 276 F.2d at 871. *But see* note 169 *infra*.

bargaining in such industries.[168] Thus, to the extent the court's opinion in *Pittsburgh Plate Glass* was based on the conclusion that the Board has been arbitrary in refusing to consider evidence of integration, it seems erroneous. The *Weyerhaeuser* opinion only compounds this error, for it depended upon the *absence* of integrated operations as a basis for distinguishing *Pittsburgh Plate Glass*.[169]

Regardless of the propriety of the Board's relying on findings of integration of operations in the immunized industries while refusing to do so in the case of other industries, a further question is whether the Board *ought* to consider integration a proper basis for a rule of industry-wide immunity. In the cases in which immunity from severance has been allowed on the basis of findings of integrated operations, the real significance of those findings must be found in the evidence on which they were based.

In each case in which immunity from severance was granted, there was evidence that the functions of the proposed group were closely interrelated with the functions of other employees. One possible reason for denying severance of a group which has a close functional relationship with other groups is that a work stoppage by either group may bring the entire plant's operations to a

168. 107 N.L.R.B. at 1422: "[*A*]*s we do not deem it wise or feasible to upset a pattern of bargaining already firmly established,* we shall continue to decline to entertain petitions for craft or departmental severance in those industries to which the Board has already applied *National Tube* . . . ." (Emphasis added).

169. It must be acknowledged, however, that the *Pittsburgh Plate Glass* case bore a close analogy to Kaiser Aluminum & Chem. Corp., 119 N.L.R.B. 695 (1957), in which case the Board did rely on evidence of integration of operations in the industry to hold the plant immune. Both cases involved new plants at which there was virtually no history of collective bargaining on any basis. In the *Kaiser Aluminum* case, the Board held that the immunity of the aluminum industry was applicable to a new plant. In so holding, the Board relied partially on a finding that there was an integration of production and maintenance work in the plant. If the Board's opinion had been more carefully written, however, the evidence of integration could have been utilized merely to establish that the plant was part of the basic aluminum industry in which a history of industrial unit bargaining was firmly established, rather than that "the same compelling reasons that exist for applying the *National Tube* doctrine in the industries referred to in the *American Potash* decision involving plants with a prior industrial bargaining history hold true with respect to new plants in those industries." *Id.* at 699.

On the other hand, the Board's finding in *Weyerhaeuser* that the industry was *not* integrated cannot be taken to mean that the Board has acceded to the *Pittsburgh Plate Glass* requirement that it consider integration in an industry determinative of whether severance can be granted. Since *Pittsburgh Plate Glass*, the Board has twice specifically refused to consider evidence of integration controlling despite *Pittsburgh Plate Glass*. Royal McBee Corp., 127 N.L.R.B. No. 113 (May 25, 1960); E. I. DuPont Co., 126 N.L.R.B. No. 103 (Feb. 29, 1960).

standstill.[170] Since most separate craft or departmental units have inherent power to effect plant-wide work stoppages, *general* reliance on findings that a proposed craft unit had the power to effect a plant-wide work stoppage would probably have the effect of precluding severance altogether.[171] Yet, unless the Board were prepared to accept such findings generally, it would seem arbitrary to rely on such findings to support a rule immunizing a particular industry from severance.

Another possible reason for denying severance of a group which has a close functional relationship with other employee groups is that such a group may lack functional distinctiveness and group homogeneity.[172] It would seem unwise, however, to assume that no such units may be appropriate for severance. The factors that determine distinctiveness and homogeneity are variable,[173] and a unit closely related in function to other employee groups may nevertheless be able to function effectively as a separate unit.[174]

Another significant element of evidence present in the cases in which a finding of an "integrated operation" was held to require immunity from severance was the fact that prior industrial unit bargaining had resulted in the development of a uniform wage scale in the industry.[175] A possible reason for denying severance

170. See, *e.g.*, 8 INT'L JURID. ASS'N BULL. 31, 33 (1939).

171. The stoppage may result from a refusal by other workers to cross the craft's picket line. See 54 COLUM. L. REV. 1159, 1161 (1954). Moreover, units such as powerhouse units are permitted to sever despite their conceded power, by virtue of controlling an essential plant function, to bring about a work stoppage in the entire plant. See *American Potash*, 107 N.L.R.B. at 1424–25.

172. See Freidin, *Craft & Splinter Units*, N.Y.U. 7TH CONF. ON LABOR 119, 132 (1954).

173. See pp. 399–401 *supra*.

174. At the most, the reasoning that functional integration in an industry is indicative of an absence of the required distinctiveness and homogeneity of craft or departmental units should only support a rule that craft or departmental units are *prima facie* inappropriate in the industry. *Cf.* Hotel Admiral Semmes, 127 N.L.R.B. No. 120 (June 3, 1960) (46 L.R.R.M. 1134), in which the Board held inappropriate a unit that did not include all the workers in the hotel because "in the hotel industry, all operating personnel have such a high degree of functional integration and mutuality of interests that they should be grouped together for collective bargaining purposes. There is no evidence in this case militating against such a finding here."

175. For example, in the *National Tube* opinion, the Board stated:

> The record discloses that, unlike the usual craft maintenance employees whose work on any particular piece of production equipment occurs for the most part at irregular intervals, the bricklayers and apprentices for whom the Petitioner seeks separate representation are engaged in a definite program of replacing and repairing on regularly succeeding occasions, the instrumentalities used in the continuous production of basic steel. Their functions are therefore intimately connected with the steelmaking process itself. . . . The resultant integration of the bricklayers with the steel production employees has

where integration is evidenced by a uniform wage scale in the industry is that the plant or company at which severance occurs may be placed at a competitive disadvantage *vis-a-vis* other employers in the industry where industrial units are retained.[176] However, it is questionable whether protection of employers from a potential competitive disadvantage is properly a policy for the Board to achieve through its unit determinations.

The *National Tube* opinion suggested that competitive unionism would be undesirable in the steel industry because it is an industry of vital national concern.[177] However, this aspect of the *National Tube* opinion has not governed subsequent decisions. For example, there is no indication in the opinions that the Board considered wet-milling, for which a rule of industry-wide immunity was announced, to be of a more vital national concern than the production of atomic energy, for which the Board refused to declare a rule of industry-wide immunity.[178]

The court in *Pittsburgh Plate Glass* properly criticized the Board for arbitrarily relying on a pattern of industrial unit bargaining as a basis for immunizing four industries, while refusing to consider such evidence in the case of other industries.[179] Although the *American Potash* opinion purported to reject findings of a "prevailing" pattern of industrial unit bargaining as a basis for denying severance,[180] the continuing immunity of the industries previously immunized under the *National Tube* doctrine was bas-

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been further advanced by a job evaluation program recently completed pursuant to agreements between the Employer and the Intervenor. . . . The wage rates of production employees, including those of bricklayers and apprentices, have been integrated into a single coordinated wage structure.

76 N.L.R.B. at 1206–07. (Footnotes omitted.)

176. In the *National Tube* opinion, the Board reasoned:

[D]ue to the integrated nature of operations in the steel industry, *any change in the unit* governing the bargaining relations between the Employer and its employees *would be detrimental to the basic wage structure* underlying the Employer's present operations, *and would necessarily have an adverse effect upon its productive capacity* in an industry of vital national concern.

76 N.L.R.B. at 1207. (Emphasis added.) The only discernible effect on the wage structure resulting from severance is that the severed unit would probably be able to command a higher wage, which would affect the employer's productive capacity by raising its labor cost above that of other employers in the industry.

177. See quotation from *National Tube* opinion, *supra* note 176.

178. *Compare* Corn Products Refining Co., 80 N.L.R.B. 362 (1948) (holding wet-milling industry immune), *with* California Research & Dev. Co., 100 N.L.R.B. 1385, 1388 (1952) (refusing immunity for atomic research facility), *and* E. I. Dupont de Nemours & Co., 111 N.L.R.B. 649, 650 (1955) (refusing immunity for plant engaged in production of fissionable materials).

179. 270 F.2d at 174–75.

180. 107 N.L.R.B. at 1421.

ed on the finding that in those industries a pattern of industrial unit bargaining was "firmly established."[181] No subsequent opinion suggests that there is an essential distinction between a "prevailing" and a "firmly established" pattern of industrial unit bargaining. Even if there were such a distinction—one which would justify different results—the Board has not followed that analysis since *American Potash*. In cases where a party opposing severance has offered evidence that the usual type of bargaining unit in the industry was the industrial unit, the Board has summarily rejected such evidence by citing *American Potash*.[182] If a firmly established pattern of industrial unit bargaining in the aluminum, lumber, steel and wet-milling industries is a reason for holding those industries immune from severance, there is no apparent reason why such evidence should not justify a rule of immunity in other industries. The least the Board can do to correct this inconsistency is to consider evidence of the pattern of bargaining in an industry when it is offered and decide whether it has become firmly established—or explain why such evidence is rejected.

Apart from the Board's inconsistent approach, however, a further question is whether a firmly established pattern of industrial unit bargaining in an industry provides a reasonable basis for a rule immunizing all industrial units in the industry from severance. Such a rule is designed to promote the entirely reasonable policy of preserving stability in industrial relations;[183] and it seems reasonable to believe that stability will be promoted by a rule which denies severance where industrial unit bargaining has become firmly established by practice and custom. Moreover, the prevalence of industrial unit bargaining in an industry over a long period of time may be regarded as evidence that industrial units are more workable, and consequently more appropriate, than craft or departmental units in the industry. On the other hand, the importance of balancing the right of employees to elect severance against the interest in stability should not be disregarded.[184] Therefore, before declaring an industry immune from severance, the Board should inquire whether minority groups such as craftsmen and departmental employees have been able to secure adequate representation through the medium of the industrial unit representative.

181. See note 168 *supra*.

182. *E.g.*, Colgate-Palmolive Co., 120 N.L.R.B. 1567, 1568 n.2 (1958); Bethlehem Pac. Coast Steel Corp., 117 N.L.R.B. 579, 580 n.6 (1957); see cases cited note 163 *supra*.

183. See notes 4–6 *supra* and accompanying text.

184. See notes 7–9 *supra* and accompanying text.

CONCLUSION

The Board's function in craft and departmental severance cases has been aptly characterized as that of an arbitrator.[185] There is little evidence that the Board has been persuaded by arguments going to the general merits of either craft or industrial unionism. Perhaps this is as much due to the amalgamation of the unions themselves as to the Board's attitude that it should not dictate the structure of American unionism.[186]

Once it is accepted that the Board's function *is* that of an arbitrator, the range of interests affected, and consequently the relevant policy considerations, becomes clearer. In each request for severance, the Board is confronted with the need to choose a course which balances the need for stability of industrial relations against the need of employees for freedom of choice. The present limitations upon severance imposed by the Board's rules can be regarded as an attempt by the Board to allow the individual worker maximum freedom of choice with a minimum disturbance of industrial stability. It may be that two of the rules—the rule requiring that proposed craft units be coextensive with the existing unit, and the rule immunizing certain industries—go too far in the direction of stability; but that possibility does not detract from the fact that the rules are reasonably designed to determine properly the basic policy choices. Similarly, the "traditional union" rule seems based on the policy of preserving stability in situations where severance might be used for reasons other than separate representation of the severed unit. The rules relating to composition of craft and departmental units and the rule against multicraft units may be explained as being a means of securing groupings which can effectively bargain as units so that stability will not be disrupted unnecessarily. Therefore, it is difficult to sustain the charge that the Board's rules "have little resemblance to the issues which are relevant in determining appropriate bargaining units for the purpose of achieving industrial stability."[187]

The greatest inadequacy of Board opinions is the lack of clearly stated reasons for the formulation and application of some of the rules. While the Board's case load probably precludes the issuance of a carefully reasoned opinion in each case, it would seem that an occasional decision should clearly state the rationale underlying certain rules. Similarly, opinions are needed which clearly enunciate the reasons that certain rules are inapplicable. This need is es-

185. See Rathbun, *The Taft-Hartley Act and Craft Unit Bargaining*, 59 YALE L.J. 1023, 1037 (1950).

186. See Krislov, *supra* note 145, at 276.

187. Freidin, *supra* note 172, at 140.

pecially acute in the case of the *National Tube* rule, which has immunized several industries from severance.

Several commentators, in discussing the Board's craft and departmental severance rules, have suggested that the Board proceed by a case-by-case approach.[188] Such a suggestion, however, disregards the ability of an expert agency to make valid generalizations in its area of expertise. Moreover, it is likely that a case-by-case approach would only bring forth more inconsistencies for the Board's critics to detect.[189] To the extent that the severance rules are based upon valid generalizations of policy and broad experience, the use of such rules insures greater consistency and a greater probability that basic policies will be advanced than would be likely with a case-by-case approach. Therefore, even though some of the rules ought to be re-evaluated, the Board should not adopt a case-by-case approach, but should continue its practice of proceeding by general rule in severance cases.

188. See, *e.g.*, 9 AM. U.L. REV. 80 (1960); 58 MICH. L. REV. 476 (1960); 1960 WIS. L. REV. 683 (1960).

189. See Krislov, *Administrative Approaches to Craft Severance*, 5 LAB. L.J. 231, 240 (1954).